

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

CARANA, INC., D/B/A/ CARMEN  
CHIRINO BOUTIQUE,

Plaintiff,

v.

JOVANI FASHION, LTD., et al.,

Defendants.

Civil No. 07-2230 (JAF)

O R D E R

This matter is before the court on Defendants' Motion in Limine, Docket Document No. 64, addressed during the course of the ongoing trial and while the court received the testimony of Plaintiff's financial expert, CPA Jorge Rodríguez, in the nature of an offer of proof outside the presence of the jury, to determine reliability and admissibility of the testimony.

We find that the only measure of damages applicable to the facts of this case is, alternatively, that provided by the Puerto Rico Dealers' Act ("Law 75"), 10 L.P.R.A. § 278b, or by the Puerto Rico Sales Representatives Act, 10 L.P.R.A. §§ 279c and 279d. If the plaintiff corporation is deemed to be a "dealer" under Law 75, damages must be calculated based on the following factors:

- (a) The actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged.

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- 1 (b) The cost of the goods, parts, pieces,  
2 accessories and utensils that the dealer  
3 may have in stock, and from whose sale or  
4 exploitation he is unable to benefit.
- 5 (c) The good will of the business, or such part  
6 thereof attributable to the distribution of  
7 the merchandise or to the rendering of the  
8 pertinent services, said good will to be  
9 determined by taking into consideration the  
10 following factors:  
11 (1) Number of years the dealer has had  
12 charge of the distribution;  
13 (2) actual volume of the distribution of  
14 the merchandise or the rendering of the  
15 pertinent services and the proportion it  
16 represents in the dealer's business;  
17 (3) proportion of the Puerto Rican market  
18 said volume represents;  
19 (4) any other factor that may help  
20 establish equitably the amount of said good  
21 will.
- 22 (d) The amount of the profit obtained in the  
23 distribution of the merchandise or in the  
24 rendering of the services, as the case may  
25 be, during the last five years, or if less  
26 than five, five times the average of the  
27 annual profit obtained during the last  
28 years, whatever they may be.

29 10 L.P.R.A. § 278b.

30 If the Plaintiff corporation is deemed to be a sales  
31 representative, damages must be calculated taking into account the  
32 following factors:

- 33 (a) The actual value of all investments and  
34 expenses incurred by the sales  
35 representative in the performance of his  
36 duties, to the extent in which they are not  
37 easily and reasonably used for some other  
38 activity in which the sales representative  
39 is regularly engaged.
- 40 (b) The good will of the business, or the part  
41 thereof attributable to the representation  
42 of the merchandise or rendering of the

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1 services in question, to be determined  
2 taking into account the following terms:

3 (1) The number of years that the sales  
4 representative has been in charge of  
5 the representation;

6 (2) the present volume of the  
7 representation of the merchandise or the  
8 rendering of the services in question and  
9 the proportion it represents in the  
10 business;

11 (3) the Puerto Rican market share  
12 represented by said volume;

13 (4) any other factor that may equitably  
14 help to establish the amount of said good  
15 will.

16 10 L.P.R.A. § 279c.

17 In the case of a sales representative, an alternative  
18 compensation is provided by 10 L.P.R.A. § 279d which shall not be  
19 greater than five percent of the total sales volume of the product or  
20 service rendered for the years in which the sales representation was  
21 in the hands of the local representative, as long as the other  
22 conditions contemplated in Section 279d are met.

23 In this case, the evidence received by the jury would allow a  
24 reasonable factfinder to conclude that from on or about late 1977 to  
25 early January 2004, the relationship between Carana and Jovani only  
26 provided for Carana to purchase exclusive items of women's apparel on  
27 a C.O.D. basis with Jovani's commitment that it would not sell the  
28 same style to other local retail stores. The evidence, seen in the  
29 light most favorable to Plaintiff, may allow a jury to conclude that  
30 in January 2004, Jovani granted exclusive sales rights of any product  
31 in their apparel lines to Carana. The sales would continue to be on

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1 a C.O.D. basis, there being no quotas to be met and no obligation to  
2 purchase any particular item. Carana would only purchase at the  
3 trade shows those items of exclusive clothing that it chose to sell  
4 at its retail store in the Puerto Rico market.

5 If the jury finds that there was no just cause for the  
6 termination of the dealership or the sales representation, as the  
7 case may be, then the issue of damages becomes relevant.

8 Regarding the testimony of the expert, we first find that said  
9 testimony is very difficult to understand in its basis and logic.  
10 Actually, the testimony that the court heard from Mr. Rodríguez made  
11 no sense to the court and will not make any sense to a jury. It is  
12 based in part on a "Normalization of Income Statements from the Years  
13 2004 to 2006" which was not part of the expert report. Testimony  
14 regarding "normalization" of income statements will not be allowed.

15 The court finds that the testimony of Mr. Rodríguez on the loss  
16 of good will is unreliable and, thus, inadmissible at trial. There is  
17 no factual and reliable basis for an award of good will and loss of  
18 business reputation of the retail store operated by Plaintiff. The  
19 analysis that Mr. Rodríguez has made of good will fails to conform to  
20 the strict requirements of the Dealers' Act and the Sales  
21 Representatives Act. The expert failed to account for the fact that  
22 Carana reported lost profits for a number of the relevant years. The  
23 corporation's accounting system never documented the particulars of  
24 sales and expenditures relevant to the Jovani line of garments. There

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1 is no evidence of investment in promotion and advertising to create,  
2 develop or enhance a market for Jovani garments in this jurisdiction.  
3 There is no evidence that Plaintiff had created any good will for the  
4 Jovani brand that did not exist independently from Jovani's  
5 promotional efforts. The reputation and customer acceptance of the  
6 Jovani brand has been developed exclusively by Defendants at the  
7 national level.

8 Furthermore, Plaintiff's expert has given no consideration to  
9 factors required by Law 75 in matters of good will calculation. The  
10 expert failed to properly define the market where the product  
11 competes and the total value of the Puerto Rico market, in order to  
12 determine the proportion of the market represented by the Jovani line  
13 of products. As stated, Carana reported a loss in its operations  
14 from 2004 to 2006, making the good-will calculation speculative and  
15 unreliable.

16 Lastly, we note that the expert's testimony must conform to the  
17 evidence already presented at trial. The rent expense of \$10,362  
18 proposed by the expert fails to consider that the space in question  
19 is part of an ongoing retail business where other garment lines are  
20 being actively sold. The inventory value of \$101,261 has been  
21 calculated under the false premise that the Jovani garments have no  
22 resale value, a premise that is totally false. The loss-of-income  
23 figure of \$331,501 fails to account for the fact that the exclusive  
24 representation lasted, at the most, from January 2004 to April 2007

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1 and that, for the period, the plaintiff corporation reported  
2 operational losses of \$29,867 in 2004, \$41,973 in 2005, and \$10,679  
3 in 2006. Curiously, the year 2007, where it is claimed that  
4 Plaintiff lost the Jovani line, was the first relevant year where a  
5 profit of \$21,637 was reported.

6 For these reasons, and for the other reasons stated in the  
7 motion in limine, the court will restrict the testimony of the expert  
8 to evidence and calculations that have the support of the record  
9 developed if they are in strict compliance with the Dealers' Act and  
10 the Sales Representatives Act for the purposes of an assessment of  
11 damages. Otherwise, the testimony of the expert will be excluded.

12 **IT IS SO ORDERED.**

13 San Juan, Puerto Rico, this 7<sup>th</sup> day of May, 2009.

14 s/José Antonio Fusté  
15 JOSE ANTONIO FUSTE  
16 Chief U.S. District Judge